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# In The
# SUPREME COURT of the UNITED STATES
## OCTOBER TERM 1956

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## No. 603

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H. L. VERHAAGEN, JAMES E. CROSS, JR., C. F. GRIFFIN, S. R. BAZEMORE, A. H. CARROLL, WILLIAM C. ELLIS, and L. H. DUNN,
*Appellants*

v.

SHERWOOD REEDER, City Manager of the City of Norfolk; CALVIN H. DALBY, Director of Public Safety of the City of Norfolk; W. J. LEWIS, Chief of the Norfolk City Fire Department, and CITY OF NORFOLK, a municipal corporation,
*Appellees.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND APPENDIX

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# In The
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*Appellees.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

---

Your petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of

Virginia, entered in the above entitled case on September 3rd, 1956.

## OPINIONS BELOW

No opinion was rendered by the Supreme Court of Appeals of Virginia. The Court of Law and Chancery of the City of Norfolk, Virginia, delivered an opinion which was not reported, and it is appended to this Petition.

## JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was pronounced on September 3rd, 1956. A petition for a rehearing was denied on October 9th, 1956. The jurisdiction of the Court is invoked under 28 U. S. C. A., Sec. 1257 (3).

## QUESTIONS PRESENTED

(1) Whether the regulation of the Fire Division of the City of Norfolk, Virginia prohibiting city firemen from joining a labor organization violates the Due Process Clause of the 14th Amendment to the United States Constitution, where said organization is a non-strike and non-collective bargaining organization.

(2) Whether the regulation of the Fire Division of the City of Norfolk, Virginia prohibiting City firemen from joining a labor organization violates the Equal Protection Clause of the 14th Amendment to the United States Constitution, where said organization is a non-strike and non-collective bargaining organization.

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision which the case involves is the 14th amendment to the United States Constitution, to-wit:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Virginia Right-To-Work Statute which the case involves is Sec. 40-68 of the Code of Virginia, 1950, and Sec. 40-71 of the Code of Virginia, 1950, to-wit:

> "It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization."

Section 40-71 reads as follows:

> "No person shall be required by any employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."

The regulation and General Order of the Fire Division

of the City of Norfolk, Virginia, which the case involves, is Section 32, Rule 25 of the Fire Division, to-wit:

"Rule No. 25

*Section 32, Membership in Other Organizations.*

No member of the Fire Division will be permitted to join or retain membership in any Firemen's Organization affiliated, or in any way connected with any organization outside of the Division of Fire of the City of Norfolk.

No Firemen's Organization will be permitted in the Division of Fire except Norfolk Firemen's Relief and Social Association, and the Firemen's Band, and members of the Division of Fire are prohibited from joining or retaining membership in any other Firemen's Organization within the Division of Fire of the City.

2. For your further information, Rule No. 26, penalties, provides as follows:

*Rule No. 26, Penalties*

Any member of the Division of Fire violating any foregoing Rules and Regulations shall be subject to suspension by the Chief of the Fire Division and subject to reprimand, fine, suspension, reduction in rank or dismissal, in accordance with Section 63, of the Norfolk Charter.

3. Members of the Fire Division retaining membership in the local union of the International Fire Fighters Association after 7:50 A.M., October 18, 1955, will

be subject to suspension from duty pending action by the duly constituted Police-Fire Trial Board.

s/W. J. Lewis
Fire Chief

Approved *s/C. H. Dalby*
C. H. Dalby
Director of Public Safety"

## STATEMENT OF THE CASE

### I. Procedural History of the Case:

Petitioners filed a bill of complaint in the Court of Law and Chancery of the City of Norfolk, Virginia, praying that a decree be entered declaring that the regulation of the Norfolk City Fire Division preventing petitioners from joining a labor organization null and void. The defendants filed a Demurrer and an Answer. A trial was had on November 19th, 1955, without a jury. The lower Court on November 28th, 1955, entered a decree upholding the validity of the Norfolk City Fire Division regulation prohibiting membership in a labor organization and denying relief to petitioners.

Petitioners filed a Petition for an Appeal in the Supreme Court of Appeals of Virginia, Defendants filed a reply brief. On September 3rd, 1956, the Supreme Court of Appeals of Virginia denied the Petition for an Appeal, and denied a Petition for a Re-hearing on October 9th, 1956. Petitioners have no further remedy for appellate review in the State of Virginia.

## FACTS

Petitioners are Firemen employed by the City of Norfolk, Virginia (Tr. 7). They are officers and members of the Norfolk Fire Fighters Association, Local 1214, affiliated with

the International Association of Fire Fighters, which is affiliated with the American Federation of Labor (p. 7).

Norfolk Fire Fighters Association, Local 1214, is a non-strike organization. Said local union does not conflict with the loyalty of petitioners to the City of Norfolk, Virginia (p. 11).

Local unions of the International Association of Fire Fighters are in existence throughout the United States of America and in the Commonwealth of Virginia, where there are local unions at Newport News, Petersburg, Portsmouth, Richmond and Roanoke (p. 8).

The purpose of the Norfolk Fire Fighters Association, Local 1214, is to enable petitioners and other members to discharge their duties as firemen in a more efficient manner, to advance their education, to promote social activities amongst the members as firemen, and to promote a spirit of fraternalization (p. 11).

Said local union, besides being a non-strike organization, does not engage in collective bargaining (p. 9).

Article III of the Constitution of the International Association of Fire Fighters states as follows: (Plaintiff's Exhibit B):

> "Section 1. The objects of the International Association of Fire Fighters shall be: To organize all fire fighters; to place the members of this Association on a higher plane of skill and efficiency; to encourage the formation of local unions; to encourage the formation of sick and death benefits funds; to encourage the establishment of schools of instruction for imparting knowl-

edge of modern and improved methods of fire fighting and prevention; and the cultivation of friendship and fellowship among its members.

"Section 2. We shall not strike or take active part in any sympathetic strike, since the work of fire fighters is different from that performed by any other workers, as we are employed to perform the duties of protecting the lives and property of communities in case of fire or other serious hazards.

"Section 3. The International Association of Fire Fighters shall be non partisan and shall not be used for the dissemination of partisan principles, nor for the promotion of candidacy of any person seeking public office or preferment."

On the 13th day of October, 1955, W. J. Lewis, Fire Chief, with the approval of C. H. Dalby, Director of Public Safety, issued a General Order directing petitioners and other members of the Norfolk Fire Fighters Association, Local 1214, to give up their membership in said local union before October 18, 1955, at 7:50 A.M., or else they would be subject to suspension from duty and subject to reprimand, fine, suspension, or reduction in rank, or dismissal (Exhibit A attached to the Bill of Complaint).

Said General Order averred that membership in the local union violated Section 32, Rule 25, of the Regulations of the Fire Division, to-wit:

"Rule No. 25

*Section 32, Membership in Other Organizations*

No member of the Fire Division will be permitted to join or retain membership in any Firemen's Organiza-

tion affiliated, or in any way connected with any organization outside of the Division of Fire of the City of Norfolk.

"No Firemen's Organization will be permitted in the Division of Fire except Norfolk Firemen's Relief and Social Association, and the Firemen's Band, and members of the Division of Fire are prohibited from joining or retaining membership in any other Firemen's Organization within the Division of Fire of the City."

On Friday, October 14, 1955, petitioners were prepared to seek an injunction restraining defendants from carrying into effect said General Order of October13, 1955, when the defendants agreed to withhold the execution of said General Order until the respective rights of the parties were determined by a declaratory judgment suit (Paragraph six of defendant's Answer).

Petitioners are dependent for their livelihood from salaries which they receive from the City of Norfolk as firemen. They will sustain irreparable harm and damage by loss of their jobs if said general order of October 18, 1955 is carried into effect. Some of the members of the local union have been employees of the Norfolk Fire Department for over thirty years.

## III. Federal Questions Raised Below in Trial Court and Before the Supreme Court of Appeals of Virginia

A. *In Trial Court:*

The Bill of Complaint in paragraphs 7 and 8 thereof, averred as follows, to-wit:

Paragraph Seven: "Your complainants aver that Section 32, Rule No. 25, of the Norfolk City Fire Department, to-wit:

"Rule No. 25

*Section 32, Membership in Other Organizations.*

No member of the Fire Division will be permitted to join or retain membership in any Firemen's Organization affiliated, or in any way connected with any organization outside of the Division of Fire in the City of Norfolk.

No Firemen's Organization will be permitted in the Division of Fire except Norfolk Firemen's Relief and Social Association and the Firemen's Band, and members of the Division of Fire are prohibited from joining or retaining membership in any other Firemen's Organization within the Division of Fire of the City."

and said general order of October 13th, 1955 are in violation of and repugnant to Title 40, Chapter 4, Article III, of the 1950 Code of Virginia, entitled "Denial or Abridgment of Right to Work", which is Section 40-68, wherein:

"It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization.

Paragraph Eight: "Your complainants aver that said Section 32, Rule No. 25 of the Norfolk City Fire Department and said general order of October 13, 1955, are in violation of and repugnant to the First and Fourteenth Amendments to the United States Constitution."

B. *Before the Supreme Court of Appeals of Virginia:*

The Petition for an Appeal in the 3rd and 4th Assignments of Error alleged that the regulation of the Norfolk City Fire Division violated the 1st and 14th Amendments to the United States Constitution and the Virginia Right to Work Statute, to-wit:

> Assignment of Error No. 3: "The Court erred in refusing to declare that Rule 25, Section 32 of the Fire Division of the City of Norfolk, Virginia and said General Order of October 13, 1955, was in violation of and repugnant to Title 40, Chapter 4, Article III of the Code of Virginia, entitled "denial or abridgment of right to work."
>
> Assignment of Error No. 4: "The Court erred in refusing to declare that Rule 25, Section 32 of the Fire Division of the City of Norfolk, Virginia and said General Order of October 13, 1955, was in violation of and repugnant to the 1st and 14th Amendments to the United States Constitution."

## ARGUMENT

I. The regulation of the Fire Division of the City of Norfolk, Virginia prohibiting city firemen from joining a labor organization violates the Due Process Clause of the 14th Amendment to the United States Constitution.

This case presents the same general issue as the case of *Government and Civic Employees Organizing Committee CIO* v. *S. F. Windsor et als*, now pending in the Supreme Court of the United States, Docket No. 423, October Term, 1956; and petitioners ask that the two cases be heard to-

gether. The Supreme Court noted probable jurisdiction in No. 423 on November 13, 1956. This case No. 423 presented the issue whether the State of Alabama can exclude a government employee, working as a clerk in a state operated liquor store, from further public employment solely because of membership in a labor union.

In *National Labor Relations Board* vs. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, 33, 81 L. ed. 893, 57 S. Ct. 615, the Court stated that the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer is a fundamental right.

In *United States* vs. *Bailey*, D. C. S. D. W. Va., 120 F. Supp. 614, 628, the Court held:

> "The right of employees to unite for their own improvement and advancement, or to refrain from so doing is a fundamental right that existed prior to either the National Labor Relations Act, 29 U. S. C. A., Sec. 151 et. seq. or the Labor Management Relations Act. It existed prior to the adoption of the Constitution."

In *Broadwater* vs. *Otto*, 37 Pa. 611, 88 A 2d 878, 881, the Court held:

> "Public employees while prohibited from striking are not prevented from the formation of employee unions or restricted from lawful activities therein."

In *Douglas Public Service Corp.* vs. *Gaspard*, 225 La. 972, 74 So. 2d 182, 186, the Court said:

> "The right of a laborer to his hire and to organize for the promotion of better wages and working conditions is, in our opinion, as absolute and essential to the pursuit of happiness as is his right to freedom of speech, religion and to life and liberty itself—all recognized under our basic law as being among these inalienable rights with which all men are endowed by their Creator."

In *Hagan* vs. *Pickard,* 171 Misc. 475, 12 N. Y. S 2d 873, the Court held that public employees who were members of Greater New York Park Employees Association and who were desirous of incorporating had a right to do so notwithstanding they were public employees.

In *Cleveland* vs. *Division 268 of Amalgamated Asso.,* 30 Ohio Ops. 395, the Court held that under the Constitution it is the right of public employees to organize and associate together for their mutual benefit and advantage.

In *Springfield* vs. *Clouse,* 356 Mo. 1239, 206 S.W. 2d 539, the Court recognized the right of municipal employees to organize a labor union, although denying the right to collective bargaining.

II. The regulation of the Fire Division of the City of Norfolk, Virginia prohibiting city firemen from joining labor organizations violates the Equal Protection Clause of the 14th Amendment to the United States Constitution. The 14th Amendment to the United States Constitution prohibits a state from denying to any person within its jurisdiction, the Equal Protection of the laws. The Virginia Right to Work Statute declares that the right of persons to work shall not be denied on account of membership in any labor

union or labor organization, and that no person shall be required by any employer to refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

The judgment of the Supreme Court of Appeals of Virginia denies to petitioners the Equal Protection of the Virginia Right to Work Law. As a result, petitioners are in danger of losing their jobs as city firemen.

If this regulation is constitutional, then the City of Norfolk can prohibit city firemen from joining a firemen's organization affiliated with the Knights of Columbus or with the B'Nai B'rith or similar organization.

In *Beverly* vs. *City of Dallas,* Tex. Civ. App., 293 S. W. 2d. 172, affirmed without opinion on October 3rd, 1956, by the Supreme Court of Appeals of Texas, two Dallas, Texas, firemen and the International Association of Fire Fighters filed a suit against the City of Dallas, Texas, to declare as invalid, ordinances of the City of Dallas, prohibiting formation of unions among city employees. The lower Court held that the ordinances were valid. The Texas Court of Civil Appeals reversed the case, holding that the ordinances of the City of Dallas prohibiting employees of the Dallas Fire Department from joining or remaining members of a labor union were invalid. The Texas Statute recited that "it is declared to be the public policy of the State of Texas that no person shall be denied public employment by reason of membership or non-membership in a labor organization." No. 51-54 c., V. R. C. S. The Texas Statute made it unlawful for public employees to strike against the State of Texas and for public officials to enter into collective bargaining contracts with labor organizations.

Petitioners respectfully request that a writ of certiorari issue to the Supreme Court of Appeals of Virginia.

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## APPENDIX

VIRGINIA:

In the Supreme Court of Appeals held at the Masonic Building in the City of Staunton on Monday the 3rd day of September, 1956.

The petition of H. L. Verhaagen, James E. Cross, Jr., C. F. Griffin, S. R. Bazemore, A. H. Carrol, William C. Ellis and L. J. Dunn for an appeal from a decree entered by the Court of Law and Chancery of the City of Norfolk on the 28th day of November, 1955, in a certain chancery cause then therein depending, wherein the said petitioners were plaintiffs and Sherwood Reeder and others were defendants, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the Court being of opinion that the said decree is plainly right, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said Law and Chancery Court.

A copy,

Teste:

/s/ H. G. TURNER
Clerk

VIRGINIA:

In the Court of Law and Chancery of the City of Norfolk.

In Chancery No. 6009

H. L. Verhaagen, James E. Cross, Jr., C. F. Griffin, S. R. Bazemore, A. H. Carroll, William C. Ellis, and L. J. Dunn,
*Complainants*

v.

Sherwood Reeder, Calvin H. Dalby, W. J. Lewis, City of Norfolk,

*Defendants*

## OPINION

In this case the court is called upon to determine whether the city of Norfolk may lawfully prohibit the members or employees of its Fire Division from joining, or, having joined, from retaining membership in the Norfolk Fire Fighters Association, Local 1214, an affiliate of the International Association of Fire Fighters, an affiliate of the American Federation of Labor.

Section 62 of the charter of the city of Norfolk permits the director of public safety to promulgate orders, rules and regulations for the government of the Fire Division. Rule 25, section 32, adopted under authority of this section provides:

> "No member of the Fire Division will be permitted to join or retain membership in any Firemen's Organi-

zation affiliated, or in any way connected, with any organization outside of the Division of Fire of the City of Norfolk.

"No Firemen's Organization will be permitted in the Division of Fire except Norfolk Firemen's Relief and Social Association, and the Firemen's Band, and members of the Division of Fire are prohibited from joining or retaining membership in any other Firemen's Organization within the Division of Fire of the City".

Admittedly the Norfolk Fire Fighters Association, Local 1214, is a firemen's labor union affiliated with an "organization outside of the Division of Fire of the City of Norfolk". See paragraphs numbered 1, 3 and 5 of the bill of complaint.

It is the contention of the complainants, all of whom are members of the city's Fire Division and of Norfolk Fire Fighters Association, Local 1214, that this rule is void and unenforceable as violative of and repugnant to the constitutional guarantee of freedom of speech and of assembly; is an unwarranted abridgement of the privileges and immunities of citizens and the inherent rights of men and deprives complainants of property without due process of law. U. S. Const. 1st and 14th Amendments, Va. Const. sections 1, 11 and 12. Additionally, they challenge the validity of this rule as violative of section 120 of the city charter, providing that no person in the classified service may be "discriminated against because of political or religious opinions or affiliations"; they contend that section 62 of the charter, allowing the director of public safety to adopt rules and regulations for the government of the division, is an

illegal delegation of the legislature's authority; and, finally, contend that the rule is void as contrary to the provisions of the Virginia Right to Work Act, now sections 40-68 through 40-74.5 of Michie's Code of Virginia, 1950.

The particular sections of this act relied upon are: section 40-68 declaring it to be the public policy of Virginia "that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization"; and section 40-71 providing that no one "shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment".

The constitution of the International Fire Fighters Association expressly provides that the members of its locals may not strike or take an active part in any sympathetic strike. Counsel for the complainants assert that this association does not contend that it is entitled to act as a collective bargaining agency for the members of Local 1214. These facts do not appear material to the issues here involved. If rule 25, section 32, is enforceable, its proscription is broad enough to include any firemen's labor or trade union, and particularly any firemen's labor or trade union affiliated with an organization outside of the Fire Division, without regard to any limitation in the charter or by-laws of such union.

While municipal employees have often attempted to organize, or to join, a labor union, I have been unable to find, nor have complainants brought to my attention, any reported case recognizing that right where, as here, it is forbidden by a municipal ordinance or regulation.

In *Carter* v. *Thompson,* 164 Va. 312, the appellants were members of Norfolk's Fire Division and the Norfolk Fire Fighters Association, then, as now, an affiliate of the International Fire Fighters Association. The lower court refused appellants' request for an injunction restraining the municipal authorities from enforcing an order of the city manager prohibiting them from belonging to a firemen's organization affiliated with another organization. In affirming the lower court the Supreme Court of Appeals stated:

> "Police and fire departments are in a class apart. Both are at times charged with the preservation of public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained."

In *Hutchinson* v. *Magee* (Pa.) 122 Atl. 234; *San Antonio* v. *Fire Fighters etc.* v. *Bell* (Texas) 223 S. W. 506 and *McNatt* v. *Lawther* (Texas) 223 S. W. 503, the right of municipal authorities to forbid firemen from joining a labor or trade union was upheld. In *Perez* v. *Board of Police Commissioners of Los Angeles* (Cal.) 178 Pac. (2d) 537; *Fraternal Order of Police* v. *Harris* (Mich.) 10 N. W. (2d) 310; *State Lodge of Michigan* v. *Detroit* (Mich.) 27 N. W. (2d) 612; *City of Jackson* v. *McLeod* (Miss.) 24 So. (2d) 319; and *Goodwin* v. *Oklahoma City* (Okla.) 182 Pac. (2d) 762, the right of municipal authorities to forbid policemen from joining a labor or trade union was upheld. In *Butler* v. *Monaghan,* 106, N. Y. S. (2d) 861, the court refused to issue a temporary injunction restraining the municipal authorities from enforcing a rule of the commissioner forbidding members of the police force from joining a labor

union, although the constitution of that state provides that, "Employees shall have the right to organize and to bargain collectively x x x". In *Seattle High School etc.* v. *Sharples* (Wash.) 293 Pac. 994 and *People* v. *Chicago* (Ill.) 116 N. E. 158, the right of a school board to decline to employ teachers belonging to a labor union was upheld. In *C. I. O.* v. *Dallas* (Tex.) 198 S. W. (2d) 143, an ordinance prohibiting any city employee from organizing or becoming a member of a labor union was pronounced valid and enforceable.

The constitutional provisions and legal principles here urged in bar of the enforcement of the rule in question, other than the effect of the Virginia Right to Work Act, were available to, and were urged by, the appellants in *Carter* v. *Thompson, supra.* In any event, that case, as the most recent expression of our Supreme Court of Appeals on this subject, is binding upon us, unless the law there established was changed by the subsequent enactment of the Right to Work Act. *Kamper* v. *Hawks,* 1 Va. Cas. 20, at page 93. Under the circumstances, this court will restrict its consideration to the effect, if any, the said act has upon the validity of the rule in question.

A liberal construction should be given to statutes granting new rights for the advancement of the public welfare. 50 Am. Jur. 420. However, if such a statute injuriously encroaches upon the affairs of government, it will not be held to apply to the state or its subdivisions, in the absence of language requiring such an interpretation.

This rule is set forth in Sutherland Statutory Construction (3rd Ed.) Vol. 3, p. 183, as follows:

> "General words or language of a statute that tends to injuriously encroach upon the affairs of the government receive a strict interpretation favorable to the public, and, in the absence of express provisions or necessary implication, the sovereign remains unaffected. x x x The subdivisions of a state, including x x cities x x are recognized as a branch of the 'sovereign' so that they are not bound by the general language of a statute."

In *Wilson* v. *State Highway Commission,* 174 Va. 82, at page 91, the court said:

> "Statutes in derogation of the sovereignty of the state must be strictly construed x x x."

It is clear that the Right to Work Act, if interpreted to apply to firemen, would injuriously encroach upon the affairs of Norfolk's municipal government. The Supreme Court of Appeals of Virginia has found that it "is imperatively necessary, if discipline is to be maintained", that firemen be restrained from joining any firemen's organization outside of the control of the Fire Division. *Carter* v. *Thompson, supra.* Furthermore, the act provides that an employer violating its terms shall be liable for any loss resulting to the employee. Section 40-73 of Michie's Code of Virginia, 1950. Nor does the act contain any provision expressly requiring, or necessarily implying, that its restrictions apply to the state or its municipalities, unless it can be said that the declaration of a public policy necessarily carries such an implication.

The public policy of a state may be specifically declared or may "be found in its constitution, acts of the legislature

and decisions of its courts". *Building Service Union* v. *Gazzam*, 339 U. S. 532, 537.

The right of employees to organize and bargain collectively is, unquestionably, a public policy of the state of Missouri. Article 1, section 29 of its constitution provides:

> "Employees shall have the right to organize and to bargain collectively through representatives of their choosing."

Nevertheless, it was held, in *City of Springfield* v. *Clouse* (Mo.) 206 S. W. (2d) 539, that the right to bargain collectively did not extend to municipal employees, and, in the companion case of *King* v. *Priest* (Mo.) 206 S. W. (2d) 547, that a rule of the police commissioners of the city of St. Louise, prohibiting members of the police force from joining a labor union, was valid and enforceable.

In the *Clouse case* the court said, p. 542:

> "For the reasons hereinafter stated, we must rule that Section 29 does not apply to any public officers or employees."

While it is the opinion of this court that the Virginia Right to Work Act does not apply to city or state employees, it does not necessarily follow that the rule in question would be held to be unenforceable even if it were determined that the provisions of this act extended generally to municipal employees. The validity of the rule would still depend upon its reasonableness. The services required of a fireman differ materially from those performed by other municipal employees. If this rule, as applied to firemen, is

reasonable, because of the hazardous character of their duties and the consequent necessity of maintaining strict discipline, it would, in any event, be upheld.

Freedom of speech, when guaranteed by a state's constitution, is a public policy of the state. However, a public servant may not complain if this right is curtailed in the interest of the general welfare. If the public necessity is reasonably indicated, a federal, state or municipal employee may be denied rights that could not otherwise be denied. This is an implied condition of public employment.

In *McAuliffe* v. *Mayor of the City of Bedford,* 155 Mass. 216, 29 N. E. 517, the petitioner had been discharged for violating a rule forbidding policemen from engaging in political activity. He sought to be reinstated on the ground that this rule invaded his constitutional "right to express political opinions". The late Justice Holmes, then a member of the Supreme Judicial Court of Massachusetts, disposed of this contention with the statement:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

In *United Public Workers of America* v. *Mitchell,* 330 U. S. 75, the court upheld the provisions of the Hatch Act restricting federal employees from taking active part in political management or campaigns.

In *Carter* v. *Thompson, supra,* appellants contended that the enforcement of this rule invaded certain of their constitutional rights and immunities. Nevertheless, the Supreme Court of Appeals of Virginia held that the require-

ments of a public fire department were such that it could be enforced.

For the reasons stated, it is the opinion of this court that rule 25, section 32, of the regulations of the Fire Division is valid and enforceable. It follows that the relief requested by the complainants must be denied.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 603

H. L. VERHAAGEN, JAMES E. CROSS, JR., C. F. GRIFFIN, S. R. BAZEMORE, A. H. CARROLL, WILLIAM C. ELLIS, and L. H. DUNN,

*Petitioners*

*v.*

SHERWOOD REEDER, City Manager of the City of Norfolk; CALVIN H. DALBY, Director of Public Safety of the City of Norfolk; W. J. LEWIS, Chief of the Norfolk City Fire Department, and CITY OF NORFOLK, a municipal corporation,

*Respondents.*

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of Virginia

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## STATEMENT OF THE CASE

On October 20, 1955, the petitioners filed a Bill of Complaint in the Court of Law and Chancery of the City of Norfolk in which they alleged that they were officers and members of the Norfolk Fire Fighters Association, Local 1214, affiliated with the American Federation of Labor. They further alleged that, on behalf of themselves

and other members, they were bringing this action to have Section 32, Rule 25, of the Regulations of the Norfolk Fire Department, declared void as being unconstitutional and inconsistent with the Virginia Right-To-Work Act. They further sought to restrain the enforcement of a certain order attached to the Bill of Complaint, dated October 13, 1955, in which the members of said union were advised that said membership was in violation of said rule; that Rule 26 of said Regulations provided that for violating any of the rules included in said Regulations, any member of the Division of Fire could be suspended, fined, reduced in rank or dismissed as provided for in § 63 of the Charter of the City of Norfolk; and that anyone retaining such membership after 7:50 a. m. on October 18, 1955, would be referred to the duly constituted Police-Fire Trial Board.

At the request of counsel for the petitioners, the respondents agreed to withold action under said order until said counsel had time to file suit to determine the rights of the parties.

The respondents filed a demurrer and answer to the Bill of Complaint and by agreement, argument was heard on both at the same time. The case was argued on November 19, 1955, at which time the petitioners presented oral evidence and exhibits. After hearing oral argument by counsel for petitioners and respondents, the Court, on November 28, 1955, entered a decree declaring Rule 25, Section 32, of the Rules and Regulations of the Fire Division of the City of Norfolk to be valid and enforceable.

The decree further refused the relief sought and dismissed the complaint with costs, and the trial judge rendered a written opinion in which he stated the reasons for his ruling. (See page 2 of Appendix attached to petition for certiorari).

Petitioners then filed a petition for an appeal in th Supreme Court of Appeals of Virginia, respondents filed an opposition brief thereto and on September 3, 1956, said Court denied the petition for an appeal and further denied a petition for a rehearing on October 9, 1956.

References to the transcript of the testimony will be made by the letter "T", followed by the appropriate page number.

Petitioners in their petition do not question the authority of the City officials to have promulgated Section 32 of Rule 25 hereinafter set forth of the Regulations of the City Fire Department prohibiting members of the Fire Department from joining or retaining membership in the Norfolk Fire Fighters Association, an affiliate of the International Association of Fire Fighters, which is affiliated with the American Federation of Labor.

While petitioners emphasize the fact that said local union besides being a non-strike organization does not engage in collective bargaining (page 6 of petition), yet, it is to be noted that the constitution and by-laws of the union may be amended. T-15.

It is to be noted that the Judge of the Court of Law and Chancery of the City of Norfolk rendered a written opinion in the case, which is filed as a part of the record, and refusal of the Supreme Court of Appeals of this State to grant an appeal was an affirmance of said opinion. (Appendix to petition).

## FACTS

The petitioners are members of the Division of Fire of the City of Norfolk, who, with knowledge (T-12) that Rule 25, Section 32, Regulations of the Division of Fire of the City of Norfolk, prohibited membership in any

organization connected with a labor union, joined the International Association of Fire Fighters, an affiliate of the American Federation of Labor. (See Paragraph 1 of "General Order" attached to Bill of Complaint; Paragraph 1 of Bill of Complaint; and T-12). On October 13, 1955, W. J. Lewis, Chief of the Division of Fire for the City of Norfolk, issued a general order to the members of the fire division in which he advised that such membership was a violation of the rule, gave the members an opportunity to withdraw, and admonished them that failure so to do would subject them to action before the duly constituted Police-Fire Trial Board. See "General Order", supra.

Rule 25, Section 32, supra, reads as follows:

> "No member of the Fire Division will be permitted to join or retain membership in any Firemen's Organization affiliated, or in any way connected, with any organization outside of the Division of Fire of the City of Norfolk.
>
> "No Firemen's Organization will be permitted in the Division of Fire except Norfolk Firemen's Relief and Social Association, and the Firemen's Band, and members of the Division of Fire are prohibited from joining or retaining membership in any other Firemen's Organization within the Division of Fire of the City."

The purpose of the above rule was to keep in the City officials the power of complete control imperatively necessary to maintain discipline. It is identical with the one involved and sustained by the Supreme Court of Appeals of Virginia in the case of *Carter* v. *Thompson*, 164 Va. 312, 180 S.E. 410. The meetings held by the association are secret. T-14, 15. The constitution and by-laws of the union may be amended. T-15.

Article XV, § 9, page 14 of the Union's Constitution reads as follows:

> "The Executive Committee is hereby vested with authority to revoke the Charter of any local whenever, upon evidence satisfactory to a majority of the Executive Committee, *it is shown that a local is guilty of disloyalty or where its actions have been adverse or detrimental to the welfare of the rank and file of the Association.*" See T-13; Exhibit B, page 14. (Italics supplied).

After the issuance of the General Order dated October 13, 1955, supra, the petitioners filed suit to restrain the enforcement of said order and to have the above referred to rule declared void. The trial court declared that the rule was valid and dismissed the complaint for reasons set forth in a written opinion made a part of the decree entered in this matter on November 28, 1955.

## QUESTIONS PRESENTED

Petitioners on page 2 of their petition, present the following questions: (1) whether the regulation of the Fire Division of the City of Norfolk hereinabove set forth violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and (2) whether said regulation violates the Equal Protection Clause of said Amendment to the United States Constitution.

## ARGUMENT

### I. Petitioners Have Not Been Denied Any Constitutional Rights and Writ of Certiorari Should Not Issue.

The Court is here concerned with the question whether a municipality can constitutionally prohibit mem-

bers of its fire department from joining a labor union. The special semi-military problems of discipline have resulted in judicial decisions sustaining such prohibition. In the case of *Carter* v. *Thompson*, 164 Va. 312, 180 S.E. 410, 412, which has been cited innumerable times, the Virginia Court said:

> "The police and fire departments are in a class apart. Both are at times charged with the preservation of the public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the state of complete control is imperatively necessary if discipline is to be maintained."

Further, in 31 A.L.R. (2nd) at page 1149, the following appears:

> "Policemen and firemen are denied union membership because they owe undivided allegiance to the public, and because it is absolutely necessary to the maintenance of discipline in the two services that public authorities have complete control over them."

And also at page 1152:

> "§ 6. Effect of public interest.
>
> "Chief among the reasons advanced by the courts in denying the right of public employees to engage in union activities are the sovereignty of the public employer; the fact that the government is established by and run for all of the people and not for the benefit of any person or group; that the profit system is missing in public employment; that public employees owe undivided allegiance to the public employer; and that the continued operation of public employment is indispensable in the public interest."

And again at page 1154 the following appears with numerous cases cited to sustain it:

"§ 8. Union membership generally.

"The right to prohibit firemen and policemen from becoming or remaining union members (usually implemented by an order of the police or fire commissioner, or some equivalent official, denying departmental employees the right to join a union), has frequently been upheld or approved."

Petitioners have alleged in their petition for a writ of certiorari at page 2 that the sole questions involved are (1) an alleged violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and (2) an alleged violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Four prior cases have reached this Court under almost identical factual situations as the instant case, and in each of said cases there was alleged a violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and none of said cases discloses a violation of any constitutional rights. *King* v. *Priest*, 357 Mo. 68, 206 S.W. (2nd) 547, appeal dismissed 333 U. S. 852, 68 S. Ct. 736, 92 L. Ed. 1133, rehearing denied 333 U.S. 878, 68 S. Ct. 901, 92 L. Ed. 1154 (1947); *State Lodge of Michigan, Fraternal Order of Police* v. *City of Detroit*, 318 Mich. 182, 27 N.W. (2nd) 612, certiorari denied 332 U.S. 818, 68 S. Ct. 156, 92 L. Ed. 395 (1947); *City of Jackson* v. *McLeod*, 199 Miss. 676, 24 So. (2nd) 319, certiorari denied 328 U.S. 863, 66 S. Ct. 1368, 90 L. Ed. 1633 (1945); *Fraternal Order of Police* v. *Harris*, 306 Mich. 68, 10 N.W. (2nd) 310, certiorari denied 321 U.S. 784, 64 S. Ct. 781, 88 L. Ed. 1076 (1943).

In *King* v. *Priest*, 357 Mo. 68, 206 S.W. (2nd) 547, the facts and procedure are practically identical to the

case at bar, with the exception that policemen were involved in the *Priest case* and firemen are involved in the case at bar. In the *Priest case*, a class action by members of the Metropolitan Police Force of the City of St. Louis was brought by declaratory judgment procedure to have declared invalid and unconstitutional a regulation of the Metropolitan Police Department of the City of St. Louis which stated that all members and employees of the Force are forbidden, under pain of dismissal to participate in the organization of or to become members of any association, meeting, union, or any organization of members or employees other than certain authorized relief, funeral and pension fund associations therein named. The police officers in the *Priest case* had joined Local Union No. 549 of the American Federation of State, County and Municipal Employees, which was affiliated with the American Federation of Labor, and several patrolmen had been dismissed from the police force of the City of St. Louis because of said union membership. In the case at bar, petitioners have joined Norfolk Fire Fighters Association Local 1214 which is affiliated with the International Association of Fire Fighters, which is affiliated with the American Federation of Labor, and no firemen have as yet been dismissed by your respondents. The regulation preventing firemen in the instant case from belonging to a union is identical in effect to the regulation involved in the *Priest case*.

In the *Priest case*, the union claimed to be a non-striking union and agreed that collective bargaining was not a proper union practice with regard to public employees, as in the case at bar. Concerning this, the Court said in the *Priest case* at page 554:

> "The petition alleged the purpose for which the union was formed, the objects of its existence, as

shown by its charter, and the methods by which it expects to obtain its objects. In accordance with these allegations, the court, of course, knows what a labor union is, the type of organization, the ordinary purposes for which it exists and how it ordinarily functions and operates. It is further a matter of common knowledge that some of the most common methods used by labor unions to accomplish their purposes are strikes, threats to strike, collective bargaining agreements, closed shop agreements, picketing, etc. It is clear that all of the rights and powers ordinarily inherent in a labor union would exist actually or potentially, in Local No. 549, regardless of the form of its charter and the present admissions of appellants. We may not assume that these available powers would not be exercised. Only the first two methods are excluded by the charter of Local No. 549, although appellants admit that the exercise of these other rights, guaranteed to labor unions in private industry by many decisions, have little or no place whatsoever when applied to the particular public employment in which appellants are engaged.

"It appears from the petition that Local No. 549 received its charter and authority to function as a labor union from the American Federation of State, County and Municipal Employees; that said organization is a labor union affiliated with the American Federation of Labor; and that such outside organizations control the policy of Local No. 549, since its constitution and all amendments are subject to the approval of the governing body, or General Executive Board of the American Federation of State, County and Municipal Employees. The petition therefore, shows upon its face that the appellants and the others on behalf of whom the suit is brought have sought assistance from outside their own membership; that they have applied to and received a charter from an outside organization; and that such other outside organization is further affiliated with a nation wide labor organization. That such outside organization will control and direct the policy of Local No. 549

must be conceded. The court will further take judicial notice of the cooperation between labor unions, of the fact that members of one union ordinarily refuse to cross the picket line of another union and of the control ordinarily exercised by national labor organizations over the local organizations.

"Members of the police department are sworn officers of the law, whose duty it is to enforce the law equally and without fear or favor. The legislature recognized the necessity for order, discipline and authority in the police force. It provided for a semi-military organization, with officers and men of different rank, and granted express authority to the Board to make rules and regulations for the *discipline* and *government* of the police. We think the rule in question bears a direct relationship to both the discipline and the government of the police force. See *Brownell* v. *Russell*, 76 Vt. 326, 57 A. 103, 104 (removal of police from active politics)."

The Court says further at page 555 in leading to its decision of no infringement of constitutional rights by the aforementioned regulation:

"While it is true that the charter of Local No. 549 purports to provide that the obligation of members of the police force shall be superior to any obligation to the union, yet, so long as human nature is what it is, a man cannot serve two masters. We think it is clear that membership in Local No. 549 might reasonably cause friction and dissension within the force and create prejudice and favoritism in the enforcement of the laws. We hold that the questioned rule was within the powers granted to the respondents by statute; that it bears a reasonable relation to the subject of discipline and government of the police on which respondents may adopt rules and regulations; and that, unless excluded by some applicable provision of the Federal or State Constitutions, the rule is not unreasonable, invalid or unenforceable against

> appellants and those on behalf of whom the suit is brought."

And the Court says in answer to the contention that the regulation violated Sec. 1 of the Fourteenth Amendment to the Constitution of the United States at page 557:

> "On the facts stated in appellants' petition, the rule complained of did not conflict with the constitutional provisions relied upon. The enforcement of the rule, as threatened, would not invade the constitutional rights of appellants, as claimed. The rule was not invalid or void as to appellants and those on behalf of whom this suit was brought. Appellants are subject to disciplinary action thereunder. The trial court should have so declared the law and thereafter denied other relief."

The decision of the Supreme Court of Missouri was appealed to the United States Supreme Court and appellants raised the question of violation of the Fourteenth Amendment to the Constitution of the United States before this Court in *Appellants' Brief In Opposition To Dismissal Of Appeal* (*Transcript of Records and File Copies of Briefs 1947*, Vol. 144, Case No. 630, United States Supreme Court Library) at pages 4-10 of said brief. This Court dismissed the appeal, 333 U.S. 852, 68 S. Ct. 736, 92 L. Ed. 1133 stating: "The appeal is dismissed for want of a substantial Federal question." Rehearing was denied 333 U.S. 878, 68 S. Ct. 901, 92 L. Ed. 1154. Since the *Priest case* is substantially identical to the case at bar, it is submitted that petitioners are bound thereby and that certiorari should be denied.

In *City of Jackson* v. *McLeod*, 199 Miss. 676, 24 So. (2nd) 319, 321-322 (1946), where a dismissal of a police officer from service by the Civil Service Commission of the City of Jackson from membership in a union was in-

volved, the Court said in quoting with approval from *Hutchinson* v. *Magee*, 278 Pa. 119, 122 A. 234:

> "In *Hutchinson* v. *Magee*, 278 Pa. 119, 112 A. 234, the Court said: 'It is generally conceded that association with an organization which, on any occasion or for any purpose, attempts to control the relations of members of *either the police or fire departments* toward the municipality they undertake to serve, is, in the very nature of things, inconsistent with the discipline which such employment imperatively requires, and therefore, must prove subversive of the public service and detrimental to the general welfare;* * *.
>
> " 'If plaintiffs desire to retain their positions in the public service, they should have obeyed the director's order; having elected not to do so (which, of course, was the privilege of each of them, as individuals), they cannot successfully complain of the ensuing results.' See also *McNatt et al.* v. *Lawther*, Tex. Civ. App. 223 S.W. 503; *San Antonio, etc., Local Union* v. *Bell*, Tex. Civ. App. 223 S.W. 506; *Brownell* v. *Russell*, 76 Vt. 326, 57 A. 103; and *McAuliffe* v. *City of New Bedford*, 155 Mass. 216, 29 N.E. 517. No case to the contrary of these holdings, when carefully examined, has been cited by appellee." (*Italics supplied*).

In deciding that the Commissioner's action was proper and within constitutional limitations, the Court said at page 322:

> "When the terms of this pledge [member's pledge to union] and the other facts mentioned herein, all of which are undisputed, are laid alongside the legal principles above set forth it is manifest, as we now think, that the Civil Service Commission had before it a cause upon which reasonable men, acting as commissioners, could reasonably arrive at the conclusion which they did, and this being the case no court or jury should be permitted, or can be permitted, within constitutional limitations, to otherwise adjudge."

Petitioner McLeod in his *Petition for Writ of Certiorari to the Supreme Court of Mississippi and Brief in Support Thereof* (*Transcript of Records and File Copies of Briefs 1945* Vol. 133, Case No. 1170, United States Supreme Court Library), at page 24 of said brief argues that, "The Action Of The City Of Jackson In Requiring Petitioner To Surrender His Rights Of Assembly, Speech And Petition By And Through A Labor Organization Of His Choosing As A Condition Of Employment Is Thereby Depriving Petitioner Not Only Of His Employment But Of His Vested Seniority And Pension Rights, Is So Arbitrary and Discriminatory As To Deprive Petitioner Of Property Without Due Process Of Law And Deny Him Equal Protection Of The Law." Certiorari was denied 328 U.S. 863, 66 S. Ct. 1368, 90 L. Ed. 1633.

In *Fraternal Order of Police* v. *Harris*, 306 Mich. 68, 10 N.W. (2nd) 310, 312 where the Fraternal Order of Police, a Michigan non-profit corporation, sought to enjoin the City Police and Fire Commission of Lansing from enforcing a resolution prohibiting certain police officers from belonging to said Fraternal Order, the Court said:

> " '*Police and fire departments are in a class apart.* Both are at times charged with the preservation of public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained.' " (Italics supplied),

quoting from *Carter* v. *Thompson*, 164 Va. 312, 180 S.E. 410.

The same constitutional questions were raised in the *Harris case* as in the case at bar and the Michigan Court agreeing with the trial judge, held, 10 N.W. (2nd) 310, 313:

> " 'Neither the plaintiffs nor the individuals concerned are deprived of any constitutional right.' "

The Fraternal Order of Police in the *Harris case* argued in its *Petition for Writ of Certiorari and Supporting Brief (Transcript of Records and File Copies of Briefs 1943*, Vol. 132, Case No. 669, United States Supreme Court Library) at page 26 that "There is a threatened invasion of plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment to the Constitution." And at page 27 of said petition that "There is a threatened invasion of plaintiffs' rights under the Equal Protection of Laws Clause of the Fourteenth Amendment." Certiorari was denied 321 U.S. 784, 64 S. Ct. 781, 88 L. Ed. 1076.

In *State Lodge of Michigan, Fraternal Order of Police* v. *City of Detroit*, 318 Mich. 182, 27 N.W. (2nd) 612, the Court stated at page 612 that:

> "Involved in this case is the reasonableness of the order of the police commissioner of the city of Detroit, prohibiting the members of the Detroit police force from becoming members of a local organization of the State Lodge of Michigan, Fraternal Order of Police, and whether the order prohibiting such membership violated the constitutional rights of assembly, guarantee of equal privileges and immunities, and of equal protection of the laws."

And the Court concluded at page 615:

> "The order promulgated by the police commissioner of the City of Detroit is considered to be within the scope of the authority granted under the charter of the city of Detroit, and cannot be said to be arbitrary or unreasonable. The plaintiffs are not deprived of any constitutional right."

The State Lodge of Michigan, Fraternal Order of Police, in its *Brief in Support of Petition for Writ of Certiorari (Transcript of Records and File Copies of Briefs 1947*, Vol. 113, Case No. 372, United States Supreme Court Library) argues at page 37 of said brief that petitioners' property

has been taken without due process of law, and their privileges and immunities as citizens of the United States are violated, contrary to the Fourteenth Amendment. Certiorari was denied 332 U.S. 818, 68 S. Ct. 156, 92 L. Ed. 395.

In many other well considered cases the Courts have held similar regulations valid. In fact, in no case which counsel have been able to find, have similar regulations been held invalid and petitioners have cited none. Among these other cases are the following: *Hickman* v. *City of Mobile*, 256 Ala. 141, 53 So. (2nd) 752 (involving firemen); *Perez* v. *Board of Police Commissioners of the City of Los Angeles*, 78 C.A. (2nd) 638, 178 P. (2nd) 537 (involving policemen); *Hutchinson* v. *Magee*, 278 Pa. 119, 122 A. 234 (involving firemen); *McNatt* v. *Lawther*, Tex. Civ. App. 223 S. W. 503 (involving firemen); *San Antonio Fire Fighters Local* v. *Bell*, Tex. Civ. App. 223 S.W. 506 (involving firemen); *C. I. O.* v. *Dallas*, Tex, Civ. App. 198 S.W. (2nd) 143. See also Rhyne, "Labor Unions And Municipal Employee Law," 1946.

Respondents do not deny to anyone the right to belong to a union. Petitioners are free men and have the right to select which master they will serve. But the City of Norfolk also has a right to say whom it will continue in its employment. The question is not one of the right of an individual to belong to a labor union, but the right of a municipality to continue in its employment, in its fire organization — a semi-military organization — one who gives his allegiance and subjects himself to the control of a foreign organization. The petitioners are conceded the right to exercise their choice. They may choose to serve the foreign fire fighters association, or they may serve the Norfolk Fire Department, but they cannot do both. No man can serve two masters.

Respondents have no quarrel as to the legality of labor unions nor do they have any disposition to question their propriety or usefulness in many cases. In private employment, they have their beneficial functions. *But we do insist that they have no place in military or semi-military organizations.* The Courts have recognized this fact and some of them have pointed to the disastrous affair at the time of the police strike in the City of Boston, Massachusetts, at which time the ability and courage of the late President Coolidge, then Governor of Massachusetts and later President of the United States, put an end to the trouble.

As said by Mr. Justice Holmes, then a judge of the Supreme Court of the State of Massachusetts, in the case of *McAuliffe* v. *Mayor of the City of Bedford*, 155 Mass. 216, 29 N.E. 517, which involved a rule prohibiting policemen from soliciting for political purposes and which has been cited numerous times:

> "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman."

## II. The Virginia Right-To-Work Statute.

The statute is correctly set forth on Page 3 of the petitioners' petition, and has been construed by the Judge of the Court of Law and Chancery of the City of Norfolk, in a very able written opinion filed as a part of the record in the case and set forth in the Appendix to the Petition, and by the Supreme Court of Appeals of Virginia, the highest Court in Virginia, as not embracing the petitioners within its provisions. The Supreme Court of Appeals of Virginia, in its order of September 3, 1956, stated that the petition for an appeal "having been maturely considered, and a transcript of the record of the decree aforesaid seen and inspected, the Court being of opinion that the said

decree is plainly right, doth reject said petition and refuse said appeal, the effect of which is to affirm the decree of said Law and Chancery Court." (Appendix, Page 1). The effect of this affirmance is that the Supreme Court of Appeals of Virginia adopted the opinion of the lower Court as its own.

Having heretofore, in this brief, shown that the Rule of the Fire Department complained of was not in violation of the provisions of the Fourteenth Amendment to the United States Constitution, respondents submit that the highest Court of Virginia having construed the above Virginia Statute as not embracing the petitioners, this Court, in accordance with many of its previous decisions, should follow the said decision.

In *35 C. J. S. Federal Courts, Page 1247, Sec. 171*, the following appears, with innumerable decisions supporting the same:

> "Where a state statute has been construed by the highest judicial tribunal of a state, such construction is regarded as a part of the statute, and is as binding on the Federal Courts as the text of the statute itself. This rule is applied even though the construction given to the statute by the state Court may differ from the construction which the Federal Court, if it were exercising its own independent judgment, would give thereto."

In the case of *United States of America v. J. Burnison, et als*, March 13, 1950, 339 U.S. 87, 94 L. Ed. 675, the construction of a statute of the State of California relating to the making of a testamentary gift to the United States was involved, which had been construed by the California Supreme Court, and the United States Supreme Court, in an opinion by Mr. Justice Reed, said:

> "The construction of the California Code by the California Supreme Court is, of course, binding on us."

In the case of *Jones v. Prairie Oil and Gas Company*, 273 U.S. 195, 71 L. Ed. 602, the Court said:

> "The Supreme Court of the United States will follow the decision of the Court of the State upon the question whether or not, under its laws, a guardian, in leasing his ward's real estate, must follow the proceedings prescribed for the sale thereof."

It cannot be said that the Virginia Right-To-Work statute was intended to take from government the power to promulgate rules such as the one herein complained of and approved in *Carter* v. *Thompson*, supra, and it seems only logical to concede that if the General Assembly of Virginia had intended to abrogate the rule, and thereby diminish the power of the city in so far as control of its firemen is concerned, it would have expressly included the State and its political subdivisions therein. Not having done so, the said statute is not applicable to the respondents herein.

An expression of how the General Assembly felt about unions in government may be found in Senate Joint Resolution No. 12, approved February 8, 1946, (Acts of Assembly of Va. 1946, P. 1006), which reads as follows:

> "Be it resolved by the Senate of Virginia, the House of Delegates concurring, as follows:
>
> 1. It is contrary to the public policy of Virginia for any State, county or municipal officer or agent to be vested with or possess any authority to recognize any labor union as a representative of any public officers or employees, or to negotiate with any such union or its agents with respect to any matter relating to them or their employment or service.
>
> 2. Nothing in this resolution shall be construed to prevent employees of the State, its political subdivisions, or of any governmental agency of any of

them from forming organizations, not affiliated with any labor union, for the purpose of discussing with the employing agency the conditions of their employment, but not claiming the right to strike."

It is not reasonable to assume that the Legislature intended the above Right-To-Work statute to apply to public employees, while declaring that it shall be against the policy of the State for any State, county or municipal officer or agent to recognize a labor union.

## PETITIONERS' AUTHORITIES

Counsel respectfully submits that for the reasons hereinafter set forth the following authorities referred to by petitioners are not applicable to the case at bar.

In *Government and Civic Employees Organizing Committee C. I. O.* v. *S. F. Windsor, et al* (Ala.) 78 So. (2nd) 646, 116 Fed. Sup. 354, now pending in this Court, Docket No. 423, October Term 1956, on which petitioners place great reliance, the question involved is the validity of a statute of Alabama, known as the Solomon Bill as applied to an organization of employees connected with the Alabama Alcoholic Beverage Control Board. Policemen and firemen are not involved. In fact, the appellants on page 3 of their *Brief in Opposition to Defendant's Motion to Dismiss*, emphasize the fact that the Court in said case is not concerned with the question whether a State can legally prohibit unionization among policemen and firemen and sets forth that in such cases the special semi-military problems of discipline have controlled the judicial decisions in sustaining the right of a State to prohibit unionization among its policemen and firemen and cites the section previously quoted herein from the case of *Carter* v. *Thompson*, supra.

Accordingly, there is no similarity between the above case and the case at bar.

In *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893, the application of the National Labor Relations Act in cases of private employment in interstate commerce was involved. It does not apply to firemen and policemen or other public employees.

In *United States* v. *Bailes* (W. Va.) 120 Fed. Sup. 614, a number of employees of the Elk River Coal and Lumber Company were indicted under the provisions of the Federal Labor Management Relations Act of 1947 for interfering with certain employees of said company in its interstate operations. It does not apply to firemen and policemen or other public employees.

In *Broadwater* v. *Otto*, 37 Pa. 611, 88 A. (2nd) 878, an Act of 1947 of the State of Pennsylvania was involved. The question was whether a discharged prison guard possessed the necessary status to participate in grievance procedures under the Act. No law, rule or regulation prohibiting such guards from being members of a labor union was involved.

In *Douglas Public Service Corp.* v. *Gaspard*, 225 La. 972, 74 So. (2nd) 182, the plaintiff sought an injunction against a number of persons who were members of the Oil Workers International Union, an affiliate of the C.I.O., to prevent them from trespassing on private property. No public employment was involved, nor was any rule or regulation, as in the instant case.

In *Hagan* v. *Pickard*, 12 N.Y.S. (2nd) 873, no regulation or rule prohibiting the employees in question from joining a union was involved.

As to the case of *Beverly* v. *City of Dallas*, (1956) Tex. Civ. App., 292 S.W. (2nd) 172, attention is called to the fact that subsequent to the decision of 1946 of *C. I. O.* v. *City of Dallas*, supra, the Texas Legislature enacted several new statutes dealing with the right to join labor unions and the following appears at page 175 of the opinion in the *Beverly case:*

> "It is immediately apparent that this statute 5154c, passed in 1947, resulted in a very definite change in the situation of public employees in the State of Texas with reference to belonging to labor organizations. *Up to that time the Texas courts had upheld the validity of ordinances similar to the ones here involved.*" (Italics supplied).

The particular statute which was held to be controlling in the *Beverly case* is set forth on page 175 of the opinion and reads:

> "SECTION 4: That it is declared to be the public policy of the State of Texas that no person shall be denied *public employment* by reason of membership or non-membership in a labor organization." (Italics supplied).

It should be noted that on page 176 of the opinion the Court stated, "The statute *specifically refers to public employees* in Section 4 and is clear and unequivocal in its terms." (Italics supplied). It is obvious that the Court held that public employees could join labor unions, and that ordinances forbidding the same were void, because the statute specifically gave such employees the right so to do. It is equally obvious, in view of the previous decision of the Texas Court, that in the absence of such statute public employees would not be permitted to join labor unions where there were municipal regulations prohibiting the same.

In *Springfield* v. *Clouse*, 356 Mo. 1239, 206 S.W. 2d 539, the unionization of firemen and policemen or other semi-military public employees was not involved. At page 542 of the Opinion, the Court said:

> "Organizations of other state, county and municipal officers are well known and have long been recognized as serving a useful purpose. Nevertheless, the organization and activity in organizations of public officers and employees is subject to some regulation for the public welfare. * * * This is because a public officers or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare or be required for the discipline of a military or police organization."

It is to be noted that on the same day the above case was decided, the Supreme Court of Missouri, in the case of *King* v. *Priest*, fully discussed above, sustained a regulation of the Police Department of St. Louis similar to the regulation in the case at bar.

## CONCLUSION

It is respectfully submitted that no Federal question is involved in the case at bar, that the regulation complained of is valid, that the petitioners have been denied no constitutional rights, and that the prayer of the petioners for a writ of certiorari should be denied.

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FILED
JUN 21 1957
JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM 1956

## No. 603

H. L. VERHAAGEN, JAMES E. CROSS, JR., C. F. GRIFFIN, S. R. BAZEMORE, A. H. CARROLL, WILLIAM C. ELLIS, and L. H. DUNN,
*Appellants*

v.

SHERWOOD REEDER, City Manager of the City of Norfolk; CALVIN H. DALBY, Director of Public Safety of the City of Norfolk; W. J. LEWIS, Chief of the Norfolk City Fire Department,and CITY OF NORFOLK, a municipal corporation,
*Appellees*

## PETITION FOR RE-HEARING

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*Appellees*

## PETITION FOR RE-HEARING

Your petitioners, H. L. Verhaagen, James E. Cross, Jr., C. F. Griffin, S. R. Bazemore, A. H. Carroll, William C. Ellis, and L. H. Dunn, respectfully pray for re-hearing of the Order of this Court dated May 27, 1957, denying their petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia.

## BASIC FACTS

This is a suit by certain firemen who are associated with an organization known as the Norfolk Fire Fighters Association, Local 1214, affiliated with the International Association of Fire Fighters to restrain the City of Norfolk, Virginia, from carrying into effect a regulation of the Fire Division of the City of Norfolk prohibiting firemen from joining or retaining membership in any firemen's organization affiliated, or in anyway connected, with any organization outside of the Division of Fire of the City of Norfolk, Virginia.

## ARGUMENT

Petitioners assign the following reasons for granting this petition:

1. Subsequent to the filing of the petition for a Writ of Certiorari, the Supreme Court of the United States decided the case of the *Government and Civic Employees Organizing Committee, C.I.O. v. S. F. Windsor, et als,* Docket No. 423, on May 13, 1957. In that case, the Supreme Court of the United States remanded the case to the District Court with directions to retain it on the docket until the appellants had exhausted their remedies in the State Courts of Alabama. On the constitutional question whether the State of Alabama can exclude a government employee, working as a clerk in a state operated liquor store, from further public employment solely because of membership in a labor union, the District Court for the Northern District of Alabama, Southern Division, had dismissed the case with prejudice.

The issues in the case, it is submitted, are identical to the issues in the case of the *Government and Civic*

*Employees Organizing Committee, C.I.O. v. S. F. Windsor, et als,* Docket No. 423, which the Supreme Court of the United States considered of such importance as to remand it to the District Court for retention on the docket for further consideration as to the constitutional questions raised therein. The only difference in the two cases is that the plaintiffs in this case are firemen and the plaintiff in the Alabama case is a clerk in the state operated liquor store.

The reasoning in the opinion of the *Government and Civic Employees Organizing Committee, C.I.O. v. S. F. Windsor, et als,* Docket No. 423, as to the constitutional questions involved applies to the constitutional questions in this case and, it is submitted, amounts to intervening circumstances of substantial or controlling effect required by Rule 58 of this Court.

2. A substantial ground available to petitioners and not raised in the petition for a Writ of Certiorari is the privileges and immunities clause of the Fourteenth Amendment of the Unted States Constitution. The Fourteenth Amendment of the United States Constitution recites that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. The First Amendment of the United States Constitution recites that Congress shall make no law abriding the right of the people peaceably to assemble.

In *Thomas v. Collins,* 323 U. S. 516, 539, the Court said:

> "Lawful public assemblies, involving no element of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm, . . . And the right either of the workmen or of unions under these conditions to assemble and

discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others."

In *Slochower v. Board of Higher Education,* 350 U. S. 551, 555, the Court said:

> "The problem of balancing the State's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful and nondiscriminatory terms laid down by the proper authorities."

In *Wieman v. Updegraff,* 344 U. S. 183, 191, The Court stated:

> "For in United Public Workers, though we held that the Federal Government through the Hatch Act could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass, or take any active part in missionary work.' 330 U. S. at 100. See also *In Re Summers,* 325 U. S. 561, 571 (1945). We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

The constitutional questions in this case are of great importance. The Supreme Court of the United

States has recognized this importance by vacating the Order of the United States District Court in the case of the *Government and Civic Employees Organizing Committee, C.I.O. v. S. F. Windsor, et als,* Docket No. 423. In addition, the constitutional question of the right of the firemen peaceably to assemble, it is submitted, should be decide by this Court.

3. It is the petitioners' belief that to deny a Writ of Certiorari is error in the following respects:

(A) It denies to firemen the right peaceably to assemble.

(B) It holds the Norfolk Fire Fighters Association, Local 1214, as a union as a matter of law, when in fact (which is uncontradicted) and in law, it is not a union.

(C) It denies to the petitioners the privileges as guaranteed under the Ninth Amendment of the United States Constitution.

(D) It applies the rationale of the antiquated and feudalistic reasoning of discipline to an organization merely because they are firemen (when said firemen are specifically associated for their mutual benefit and are EXCLUDED from striking and bargaining for wages).

*As to Item A:*

It can be stated with accuracy that the right to peaceful assembly is unquestioned. (*Thomas v. Collins, supra*). Is the fact that they are firemen *eo nomine* "a grave and immediate danger"? The transcript and the record are without misapprenhension. It is simply this: There are a number of firemen associations in these

United States and Canada. In fact there are firemen associations in Virginia in the Cities of Newport News, Petersburg, Portsmouth, Richmond and Roanoke. Are not firemen possessed of the same privileges as members of the bar, nurses, and physicians?

There is no evidence of "grave and immediate danger."

*As to Item B:*

Cases cited by the appellees do not apply to the facts here. The petitioners *are not a union, legally speaking.* Why? Because they have no right to strike or to bargain collectively. In fact, the Constitution of the Association forbids the right to strike.

The brief of the City of Norfolk admits this and adds ah, that is the next step. This Court will not decide a case on "what will be", but on the record and facts.

Actually, we do not believe that this Court is troubled by this factual question, in view of the uncontradicted testimony on this point, as it is by the legal question.

*As to Item C:*

The Ninth Amendment to the Constitution states that there are certain unenumerated rights that are retained by the people which are the inherent natural rights of the individual.

In Patterson, *The Forgotten Ninth Amendment* (1955), it is said:

> "It might be said that the theory of individual inherent rights is a part of our unwritten Constitution, in the same manner in which portions of the unwritten English Constitution are recognized

and enforced. But we feel that it is much more than the unwritten Constitution; the individual inherent rights and liberties antedate and are above constitutions and may be called pre-constitutional rights.

"This idea has been aptly expressed in 16 C.J.S. page 578, paragraph 199, as follows:

'The Constitutions are not the sources of our personal rights. Our theory of government is that the people, in full possession of inherent, inalienable rights, have formed the government in order to protect these rights, and have incorporated them into the organic law as a shield against unwarrantable interference by any department of governments.'

"John Adams, the second great President of the United States, assured the people as follows:

'You have rights antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe.'

"In Gow vs. Bingham, 107 N.Y.S. 1011 (Supreme Court of New York), the court held that we possess certain rights which have their origin as natural rights independent of any express provision of law, and that constitutional provisions are not the sources of these rights. The right 'to be let alone' was one of the rights sustained by th court.

"In a relatively recent decision of the Supreme Court of Texas (Spann vs. City of Dallas, 111 Texas 350, 212 S.W. 513) this same confidence in natural rights is expressed:

'To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe

its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty—an expression of his freedom, guaranteed as inviolate by every American Bill of Rights.'

"In City of Pineville vs. Marshall, 299 S.W. 1072, 222 Ky. 4, by the Court of Appeals of Kentucky, the court held that:

'While the Bill of Rights declares and secures certain inherent rights, it does not create them, nor does it license an individual to ignore and defy the correlative rights of other individuals or of society.'

* * * * * *

"It is no criticism of the Supreme Court of the United States that the Ninth Amendment has not been construed. The question has simply never been presented to that Court for review"....

* * * * * *

"(1) Opinions of the Supreme Court of the United States beginning with Eilenbecker vs. The District Court of Plymouth County, Iowa, 134 U. S. 131, 33 L. Ed. 801, definitely show that only the first eight amendments to the Constitution were intended to be narrowly construed as inhibitions upon the National Government. Since the decision of this case in 1890, the Supreme Court of the United States has abandoned the dust-covered dictum that the first ten Amendments to the Constitution were intended as restrictions upon the National Government, and now holds that only the first eight amendments were so intended. Since the decision of the Eilenbecker case, there has been no decision of the Supreme Court of the United States and no dictum which has adhered to the old text. The mechanical error in the case of Livingston vs. Moore definitely establishes that it is no precedent or authority for the narrow construction of the Ninth Amendment.

"Therefore, the Ninth Amendment is unshackled from its early erroneous classification and the cloud has been removed, and it is now ready for use any time our courts or our people may discover an unenumerated human right.

"(2) Our constitutions are not the sources of our liberties. In Calder vs. Bull, 3 Dallas 386, 1 L. Ed. 648, and in Savings and Loan Association v. Topeka, 87 U. S. 686, 22 L. Ed. 455, cited also in the next succeeding chapter, the Supreme Court of the United States has recognized the doctrine of inherent human rights which are entitled to protection against the legislative acts of the several states, even though such rights may be unenumerated in the Constitution of the United States. These cases proceed upon the theory that there are rights in every free government which are beyond the control of state governments. These cases recognized the doctrine of the implied reservation of individual rights. This is the doctrine of the Ninth Amendment. Although the decision of Calder vs. Bull has been questioned, these cases have been cited many times with approval, and we do not find any decision which has overruled or distinguished the holding in these cases.

"These decisions can be construed in no other way except to establish that inherent rights, whether enumerated in the Constitution of the United States or not, are entitled to protection, not only against the Federal Government, but also as against the government of the several States.

* * * * * *

"We either believe in inherent human rights, or we do not believe in them; if we believe in such inherent rights, then such rights must be protected against the unwarranted power of either the National or the State Governments, otherwise they

fail and cannot be classed as an inherent right at all.

* * * * * *

"In Green vs. Frazier, 253 U. S. 233 (240), 64 L. Ed. 878 (881), 40 S. C. 499, The Supreme Court followed the opinion of Justice Miller, but has used the due process clause in the Fourteenth Amendment as the basis of its decision; however, Justice Miller, speaking for the Court in Savings and Loan Association vs. Topeka, made no mention whatsoever of the Fourteenth Amendment or any other amendment, or any portion of the Constitution, but the Court's decision was based solely upon the existence of certain fundamental rights which were beyond the control of the State.

* * * * * *

"At the time of the adoption of the Constitution it was common practice in several of the States that a person convicted of crime should be branded with a branding iron as an outward proof of his iniquity. No court would tolerate such a practice at this time, even though it was not considered cruel and unusual punishment at the time of the adoption of the Constitution.

"At the time of the founding of this Government, there was still wide-spread belief in witchcraft, and statutes of some of the States punished its practice. After a hundred and sixty-five years of enlightment, would we now tolerate the punishment of any individual for witchcraft?

* * * * * *

". . . We do not believe that it was ever intended that the science of the law should become so fixed and archaic, while all other sciences may go forward in the discovery of truth and may utilize it wherever it is found. We should not attempt to harness our rights to a civilization as it

existed one hundred and sixty-five years ago, and it was not the intention of the framers of the Bill of Rights that we should do so.

* * * * * *

"Some of the rights may now be making their appearance.

"The right of privacy may be such a right. If there is such a right, it is difficult to classify it under any right that is enumerated in the Constitution. This is a right which is of comparatively recent recognition. Some courts call it a fundamental right. While the courts seem to feel that it should exist, there is a great timidity and lack of forthrightness in the protection of this right, because its existence is not to be found in the written and enumerated law.

"There are many questions surrounding our labor problems that might appropriately come under the classification of rights of natural endowment. Do men have a natural or inherent right to strike? Does an employer have the right or privilege to choose those whom he desires as employees, or can such employer be forced to employ against his will? Is there a fundamental right to work?"

## CERTIFICATE OF SERVICE

I, Louis B. Fine, counsel for petitioners, do hereby certify that the foregoing petition for re-hearing filed in this case is presented in good faith and not for delay.

LOUIS B. FINE
*Counsel for Petitioners*

*As to Item D:*

The hereinabove discussions for A, B, and C are applicable. In such a case as this civilization and society in a democratic form of government will permit firemen to associate with each other *after duty*.

## CONCLUSION

For the foregoing reasons, the petitioners believe that this Honorable Court, even if it should adhere to its present result, may be desirous of having its opinion and expression on the subject for posterity. This case is a test case, upon which many other cases must rely (and for which other municipalities may enact similar orders of severance by an individual; *e.g.* such as the Fire Division). In some ways, it is a case of first impression, and the decision, however rendered, will constitute, a land mark in Constitutional law and a judicial precedent of the highest importance.

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